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No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929

JAMES C. DAVIS, FEDERAL AGENT, ET AL., *Petitioners,*

v.

MRS. MARY PRESTON, ADMINISTRATRIX, *Respondent.*

SUPPLEMENTAL BRIEF FOR RESPONDENT ON MOTION FOR SUBSTITUTION

— BY —

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SUPPLEMENTAL BRIEF FOR RESPONDENT

In the first place, respondent begs leave to join in the motion for substitution filed herein by petitioners, and in support of their joint request submits the following:

Respondent agrees with petitioners that the 1925 statute, to which Mr. Justice Van Devanter called attention on oral argument, does not operate to prevent substitution at this time, and concurs in all the views expressed by counsel for petitioners as grounds for such position, save such, if any, as presented in the supplemental brief for petitioners as might militate against the position of respondent that none of the grounds urged by petitioners for abatement of respondent's action, or which sought to interpose limitations thereto, are sound and well taken; and in addition to the grounds

urged by petitioners in their supplemental brief in support of their motion for substitution at this time, respondent presents the following:

I.

Proposition 1.

Sec. 11, subdivision (a) of Chap. 229 of the United States Statutes at Large, Volume 43, approved February 13, 1925, and now constituting Section 780 of Title 28 of the Judicial Code as contained in the United States Code Annotated, is a general law, governing causes of action generally, whereas the Winslow Act, paragraphs (h) and (i), Section 206, Transportation Act of 1920, 32 Stat. L., 1443, United States Code Annotated, Title 49, Section 74, effective March 3, 1923, is a special Act governing substitution in cases arising under the Transportation Act, and not being expressly repealed by the former general Act, remains unaffected thereby, and continues to control the disposition of this case in the matter of substitution.

Statement.

At the risk of appearing a trifle pedantic, for the convenience of the court, we file the following chronological statement of the statutes under consideration, which may be helpful to the court in passing not only on this motion for substitution, but on the general questions affecting the regularity of proceedings on the other questions raised by petitioners involving an asserted abatement and the bar of the statute of limitation.

Article 1594, United States Compiled Statutes of

1916, and being known as the Act of February 8, 1899, is as follows:

> "No suit, action or other proceeding lawfully commenced by or against the head of any department or Bureau or other office of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may take such order as shall be equitable for the payment of costs."

Subdivision (d) of what is known as the 1920 Transportation Act, passed February 28, 1920, Chapter 91, Section 206, 41 Stat. L., 461, and being subdivision (d) of Section 74 of Title 49 of the United States Code Annotated, is as follows:

> "(*d*) *Abatement of Actions.* Actions, suits, proceedings, and reparation claims of the character above described pending on February 29, 1920, shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a) of this section."

Subdivisions (h) and (i) of Section 74, Title 49, and constituting what is known as the Winslow Act, effective March 3, 1923, Chapter 233, 42 Stat. L., 1433, are as follows:

> "(*h*) *Effect of death, etc., of director general, or of public officer bringing suit arising out of Federal control.* Actions, suits, proceedings, and

reparation claims, of the character described in subdivision (a), (c), or (d) of this section, properly commenced within the period of limitation prescribed, and pending on March 3, 1923, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a) of this section, but may (despite the provisions of Section 780 of Title 28, Judicial Code and Judiciary), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office. Nor shall any action, suit, or other proceeding brought by any public officer or official, in his official capacity, to enforce or compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of Section 780 of Title 28, Judicial Code and Judiciary), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

"(*i*) *Substitution of parties validated.* Orders providing for a substitution in such cases made before March 3, 1923, by courts having jurisdiction of the parties and subject matter are validated, anything in Section 780 of Title 28, Judicial Code and Judiciary, to the contrary notwithstanding."

Section 11, subdivision (a), Chapter 229, U. S. Stat. L., Volume 43, approved February 13, 1925, and now constituting Section 780 of Title 28 of United States Code Annotated is as follows:

"Sec. 11. (*a*) That where during the pendency of an action, suit, or other proceeding brought by

or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a territory of an insular possession of the United States, or of a county, city, or other governmental agency of such territory or insular possession, and relating ot the present or future discharge of his official duties, such officer dies, resigns or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

Section 13 of the foregoing Act approved February 13, 1925, carries the repealing clause, and a careful checking of the statutes therein expressly repealed fails to disclose a repeal of the Winslow Act approved March 3, 1923, subdivision (h) and (i) of Section 74, Title, 49, United States Code Annotated set out *supra,* but does include the following general repealing clause: "All other Acts and parts of Acts insofar as they are embraced within and superseded by this Act or are inconsistent therewith."

Authorities and Argument.

In such a situation as is disclosed by the above statement it is claimed by respondent that the following from Volume 26 of Am. & Eng. Enc. of Law, (2nd Ed.), subject "Statutes," page 739 *et seq.* has complete and full application:

"It is a canon of statutory construction that a

later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a persumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. This rule, however, is not one of positive law, but of construction only, adopted to settle legislative intent in the absence of words declaring such intent.

"**The Reason** which has been given for this rule is that in passing a special Act the legislature has its attention directed to the special case which the Act was made to meet, and considers and provides for all the circumstances of that special case; and having done so it is not to be considered that the legislature, by a subsequent general enactment, intended to derogate from the special provision previously made where it was not mentioned in such enactment."

The foregoing text is so generally and universally supported by authorities in the appended notes thereto, that it is not thought necessary to cite supporting authorities, but for the convenience of the court the following few of its own decisions are given:

Furman v. Nichols, 8 Wall. 44, 19 L. Ed. 370.
State v. Stoll, 17 Wall 425, 21 L. Ed. 650.
Cass County v. Gillett, 100 U. S. 585, 25 L. Ed. 585.
Louisiana v. Taylor, 105 U. S. 454, 26 L. Ed. 1133.
Ex Parte Crow Dog, 109 U. S. 556, 27 L. Ed. 1030, 3 Sup. Ct. 396.

Chew Heong v. U. S., 112 U. S. 536, 28 L. Ed. 770, 5 Sup. Ct. 255.
Rodgers v. United States, 185 U. S. 83, 46 L. Ed. 816, 22 Sup. Ct. 582.
Joehanson v. Washington, 190 U. S. 179, 47 L. Ed. 1008, 23 Sup. Ct. 825.

The foregoing authorities all reiterate the elemental rule that implied repeals are not favored, and are never sanctioned if two Acts can stand together, and that a former law is never repealed by a later one only when harmony is impossible; and to a like effect see 26 A. & E., 721; 25 R. C. L., page 918, Section 169.

Within the purview of the rule above set out is the following from 36 Cyc., 1092, subject "Statutes":

> "A subsequent statute which is general does not repeal or abrogate a former statute intended to operate upon a particular subject[8], or for the benefit and relief of individuals[9]."

Note 8, shown in the text is supported by Trausch v. Cook County, 147 Ill. 534, 35 N. E. 477; and a later running down of subsequent annotation discloses the following later cases:

Witt v. Shelton, 240 Fed. 8 (C. C. A., Eighth Crt.), 265.
Birmingham v. Southern Express Co., 164 Ala. 529, 51 Southern 159.
Pepper v. Horn, 73 Southern (Ala.), 46.
Renner v. State, 182 Ind. 394; 106 N. E. 703.
McNeil v. Kingsbury, 190 Calif., 406, 213 Pac. 50.
Western Shore Lumber Co. v. Riley, 192 Calif. 144, 218 Pac. 761.

II.

Force is added to the foregoing contention in this case when it is considered that it is extremely doubtful

if the Act of 1925 applies at all, and for that matter as to whether the Act of 1899 applies.

Section 11 of the 1925 Act as also the 1899 Act applies to actions brought by or against an officer of the United States "and relating to the present or future discharge of his official duties." This, it would seem, was intended to cover survival of actions of a personal character against officers and department heads and not suits involving government liability.

The suit at bar against the Director General and the successor agent did not relate to the *present* or *future* discharge of his official duties."

In construing the Transportation Act it should be looked on as a whole, in order to determine the status of the Director General and Federal Agent, and when thus considered it will be noted that Section 206-a of the Transportation Act, Code Title 49, Section 74-a provides that suits might be brought against the Federal Agent to be designated by the President "for such purpose." In other words, he is an agent created for the purpose merely of having some one in whose name the action may be carried on in order to determine government liability. These agents do not have or discharge any official duties; they are purely figure-heads set up for the purpose of being sued in order to determine the government's liability.

The judgment against such Federal Agent, under subdivision (e) of Section 206 of the Transportation Act are required to be paid out of the revolving fund created by Sec. 210 of the Transportation Act, which is a government fund. Clearly, this is an action to determine governmental liability as distinguished from the survival of a cause of action of a personal charac-

ter. There is not a single official duty enjoined on employes of the carriers, and the fund out of which judgments are paid are not administered by the Federal Agents in their official capacity. In other words, the principal point is that there is a fundamental difference between a suit of a personal character against an official for things that he has done and one against an agent set up merely for the purpose of being sued.

Unless this contention is foreclosed by the *per curiam* opinions of this court in Payne v. Industrial Board, 258 U. S. 216, 66 L. Ed. 790 (citing LeCrone v. McAdoo, 253 U. S. 217, 64 L. Ed. 869, 40 Sup. Ct., 510) and United States Railway Administration v. Slatinka, 260 U. S. 747, 43 Sup. Ct. 247, 67 L. Ed. 494, it would seem to find support in reason and principle, and is directly supported by the following decisions from State courts:

DeWitt v. N. Y. C. R'y Co., 196 N. Y. S. 870, 198 N. Y. S. 542, 909.

Toothacher v. Hines, 112 Kan. 304, 210 Pac. 110.

See also:

Hill v. Davis, 257 S. W. (Tex.), 340.

Miekle v. Hines, 263 S. W. (Tex.), 1078.

Kilgore v. Hines, 265 S. W. (Tex.), 744.

As to the difference between suits of a personal character and one involving government liability, see also 1 C. J. 146, Section 230, and thereunder Murphy v. Utter, 186 U. S. 95, 22 Sup. Ct. 766, 46 L. Ed. 1070.

If the court finds it necessary in the disposition of the motion under consideration, to reach the contention made here, it might with profit re-examine the *per curiam* Payne and Slatinka cases, and determine how far the court meant to go in those cases in a disposition of the grounds urged *supra* to the applicability of the 1899

Act to cases arising under the 1920 Transportation Act, and whether it is willing to make further extension of LeCrone v. McAdoo to the question that has arisen herein under the 1925 Act.

We might add, as contended on oral argument, that it would not seem that it was ever intended that the 1899 Act had any application, because if Congress had intended that it should be looked to at all, it would have been as a whole; and since it provided that suits against certain government officials *should not abate* if substitution was effected in twelve months, and if Federal agents and suits against them under the Transportation Act setting them up were intended to be governed by the 1899 statute, it was unnecessary for Congress to insert at all subdivision (d), in the Transportation Act, providing against abatement, and having specially inserted it, it must be presumed that Congress had "its attention directed to the special case which he Act was made to meet, and considered and provided for all the circumstances of that special case." 26 A. & E. Enc. of Law (2nd Ed.) 741.

Thus, Congress not having fixed the time within which substitution should be made, it was left open for any time during the progress of the proceedings.

III.

It is noted in petitioners' supplemental brief on the motion under consideration that on page 6 that they re-invoke the court's ruling on petitioners' contention involving the asserted abatement of the present case and the running of the statute of limitations thereon, and on page 8 of the supplemental brief we find the following:

> "If it be assumed that the action was properly commenced within the period of limitation prescribed, as required by the provisions of the Act, and that said action was pending at the time the subdivision took effect, then, of course, subdivision (h), known as the Winslow Act, would have application and relieve the case of all embarrassment in respect to substitution."

That the action was "properly commenced" as against petitioners' contention that it was brought in Mrs. Preston's individual capacity, we point out, as was done on oral argument, that ever since M. K. & T. v. Wulf, 226 U. S. 570, 57 L. Ed. 355, wherein, in an opinion by Mr. Justice Pitney, it was held that changing a suit from a reliance on State to Federal law, and setting up allegations as to the injury arising in interstate commerce, was a "change in form rather than in substance," this court has consistently followed such holding, as will appear in Seaboard Air Line v. Renn, 241 U. S. 290, 60 L. Ed. 1006, in an opinion by Mr. Justice Van Deventer, and in N. Y. Central v. Kinney, 260 U. S. 340, 67 L. Ed. 294, opinion by Mr. Justice Holmes.

In fact, counsel for petitioners admitted at the bar of the court that the action was brought in such form in Mrs. Preston's indivivdual capacity as was amendable within the purview of the above decisions, but based his contention entirely on a more restricted meaning sought to be attached to the words "properly commenced."

The rule of liberal construction contended for in remedial statutes such as the Winslow Act will be found clearly set out in Danforth v. Groton Water Company, 178 Mass. 472, 59 N. E. 1033, 86 A. S. R. 495, Dunbar v. Boston and Pacific R'y Co., 181 Mass. 383, 63 N. E.

916, and Robinson v. Robins Dry Dock & Repair Company, 238 N. Y. 271, 144 N. E. 579, and which decisions, in the liberal rules of construction therein announced, go to the extent of holding that the legislature has power to allow even the statutes of limitation to be relieved against by calling a liability into being where there was none before "if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small," as ruled by Mr. Justice Holmes in Danforth v. Groton Water Company, *supra*, as the then Chief Justice of the Supreme Court of Massachusetts.

And we might add, of course the United States government could waive limitation as against it. 39 Cyc. 780, Note 58.

This action having been properly commenced, and pending at the time of the termination of Federal control, it would have, sans the 1899 Act, continued under subdivision (d) of the 1920 Transportation Act, and when the 1899 Act was repealed by the Winslow Act, it clearly related back and prevented any abatement or the operation of any statute of limitation Dougherty et al. v. Payne, 291 Fed. 60, 61; Moore v Hines, 135 Miss. 842, 100 Southern 392.

In addition to the contention hereinabove made to the effect that the action was "properly commenced," attention is called to the query of counsel for petitioners by Mr. Acting Chief Justice Holmes as to whether or not the words "properly commenced" did not relate to the defendant, an anticipation of the very contention made by counsel for respondent as set out in the brief.

It may be that this subdivision of this supplemental brief goes slightly beyond the sole question involved

under the motion to substitute, but the questions were projected by petitioners' supplemental brief, and all are so closely interrelated as to be difficult of separate treatment.

It is respectfully submitted that the motion to substitute should be granted.

Respectfully submitted,

JAS. W. WAYMAN,

ROBT. L. COLE,
Attorneys for Respondent,
Mrs. Mary Preston.

The undersigned counsel for petitioners acknowledge receipt of a copy of the foregoing supplemental brief of respondent and waive service thereof.

.....

.....
Attorneys for Petitioners.

ADDENDA

On The Merits.

With the kindly consent of counsel as indicated below, and with a like hoped for indulgence on the part of the court, to which end leave is respectfully prayed, it is desired to submit the following additional authorities and considerations to which attention was directed on oral argument, and which it is desired, for the convenience of the court, to present herein:

On oral argument we called the court's attention to the following two cases, additional to those cited in respondent's brief, and which cases we think the court took on their brief:

Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 66, 24 Sup. Ct. 24, 48 L. Ed. 99.
Western & Atlantic Railroad Co. v. Hughes, 278 U. S. 496, 49 Sup. Ct. 231, 73 L. Ed. 473.

With regard to Choctaw, Etc., Company v. McDade, *supra,* a case in which liability was predicated on an alleged striking of McDade by an iron water spout hanging over the track, Mr. Justice Sutherland asked counsel for respondent if there was not evidence of injuries to McDade's head, indicating that the water spout hit him, as to which detail counsel was not in position to state off hand, but on looking at the case since he finds the following:

> "There was also testimony tending to show, from the location of the water spout and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the overhanging water spout."

As stated on oral argument, however, and as presented again here, the case was cited not only as one dependent upon circumstantial evidence, but also to show there was no necessary incongruity between a party being struck or caused to fall under a moving train at one place, and his body being found some distance away, since in the McDade case his body was found some 675 feet beyond the tank, and in the case at bar, as we recall the record, Preston was found some block or so from the end of the loose rail where his hat and lantern were discovered.

As stated on oral argument, when an inanimate object falls, given the same circumstances, it will always fall the same direction, but when a man finds himself falling, in an effort to save himself, he will assume many surprising and unexpected attitudes and positions, and in such cases it is impossible to follow out all of the gruesome details of the death struggle.

As to Western and Atlantic Railroad Company v. Hughes, *supra,* Mr. Justice Van Deventer asked if the proof did not show that Hughes' head hit one of the uprights of the bridge, to which we replied that it did, and added that likewise the proof indubitably showed that Preston was killed by being run over by the train, and that the question in the Hughes' case was whether the evidence, consisting solely in circumstances, was sufficient to warrant the inference that Hughes was caused to fall by the sag in the track just before the approach to the bridge, and likewise in the Preston case, was whether the evidence was sufficient to warrant the inference of Preston tripping over the rail.

As stated in the argument, the record in the Hughes' case was withdrawn by counsel from the Supreme

Court Clerk's office and taken to the hotel and carefully read, while in Washington, and the first and chief witness for the plaintiff said it was mere guess work on his part as to whether this sag, or in fact, as to what, caused Hughes to fall.

It might be added that the Coogan case, on which petitioners so strongly rely here, was cited in the Hughes case on the question that the Federal law applies, and which shows that that case was present in the mind of this court in the disposition of the Hughes case.

There was one distinction in the Coogan case, to which we neglected to call attention in our original brief, and that was that Coogan was expected to go between the cars about 15 feet from the place where he was found, and as to which Mr. Justice Butler said that "one between cars coupling the airholes is very liable to be run over if the train is unexpectedly moved."

In the Preston case the undisputed evidence showed that where the end of the loose rail was located and adjacent to which the hat and lantern were found, Preston had no business to go between the cars. True, counsel for petitioners sought to show that he was expected to be 110 feet further south down the track in the direction in which his body was found for the purpose of making a coupling, but the great weight of the evidence was against that contention, and the undisputed evidence shows his hat and lantern were found some 100 or 110 feet north of such point, showing he never reached it for the purpose of making such coupling.

On the question of where the hat and lantern were found, we desire to quote the following from the testi-

mony of T. C. Morris, defendant's witness, and which we should have inserted on page 6 of respondent's brief at the point where we were answering petitioners' contention that "there is some confusion as to where" the hat and lantern were found:

> "I judge that heel mark that was talked about there that night was a few feet just across and off of the planking that protected the McKinney Street crossing, it has been so long, but I judge it was somewheres between twelve and maybe twenty feet, just a short distance off the planking. The place where I saw the hat and lantern was farther over to the left but just about the same distance from McKinney Street. *The mark I saw that was talked about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were farther over to the left still, and about the same distance from McKinney Street.*" (R. 79.) (Italics ours.)

This witness had previously testified: "I saw this young fellow pick up the hat." * * * (R. 77.) And also: "I saw the lantern picked up also. I was with him at the time that was picked up." * * * (R. 78.)

Respectfully submitted,

JAMES W. WAYMAN,

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Attorneys for Respondent,
Mrs. Mary Preston.

The undersigned counsel for petitioners acknowledge receipt of a copy of the foregoing supplemental brief of respondent on the merits and waive service thereof; and agree that respondent may file the same subject, of course, to its being agreeable to the court.

.....

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Attorneys for Petitioners.